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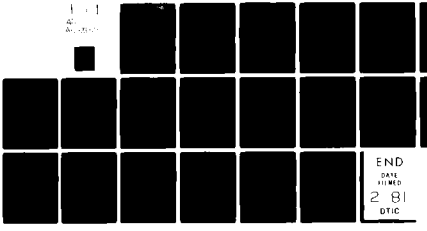

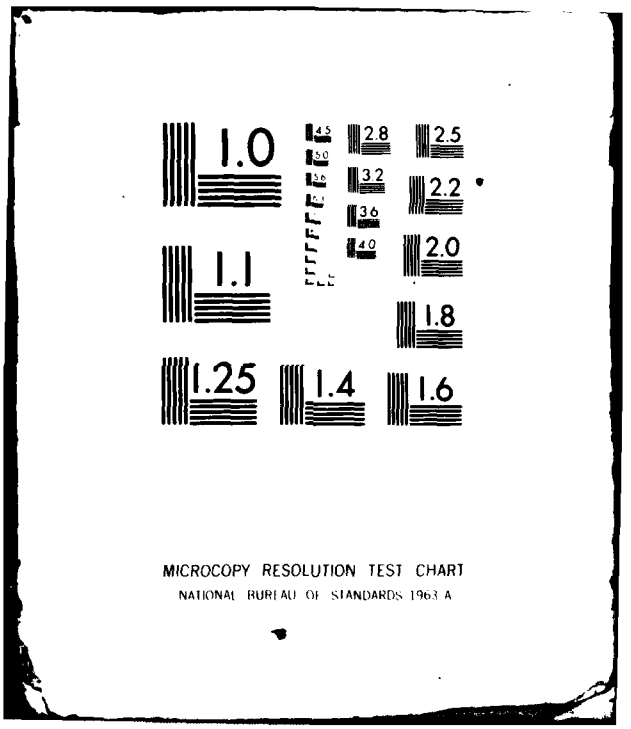
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# The Laws of War and Moral Judgment

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The laws of war constitute an institution about which it is difficult to have other than mixed feelings. On the one hand, it seems clear that practices as ugly as those involved in warfare should be regulated, if only to secure society as far as possible against the emergence of unchecked brutality. But when the rules that have been devised toward this end are examined, doubt is cast upon even this cheerless justification by the various reprehensible forms of damage and destruction with which they are compatible. The laws of war appear to condone violence by belligerents whose purposes are morally indefensible, and furthermore to allow a degree of suffering by those affected by war that is often out of all proportion to the apparent advantages to be had from fighting. When violations permitted by the laws of war of what moral sensibility prescribes as right are so common, and even the laws of war themselves so plainly violated, the notion of legally regulating the violence that armed forces inflict upon one another and upon passively suffering people unfortunate enough to have been visited by war may come to seem a cruel joke. The result is often a skepticism concerning every aspect of the laws of war--their practicability, their legal validity (and thus their very existence as rules of law), and their defensibility in terms of the requirements of morality from which they appear so often to deviate. Such skepticism is only strengthened by reflection on the vagaries of criminal enforcement and punishment, which at times seem not only wholly ineffective but also to introduce their own special injustices. It is a skepticism well expressed in the observation that if international law is at vanishing point of law, then the laws of war are at the vanishing point[2] of international law. That perennial figure, the apologist for international law, may thus be held to face his greatest challenge when the time come

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DEPARTMENT OF STATE

Washington, D.C. 20520

February 6, 1980

Mr. Harry Schrecengost
Defense Technical Information
Center
Cameron Station
Alexandria, Va. 22314

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Sincerely,

Edward N. Lundstrom

Edward N. Lundstrom
Research Documentation Officer
Office of External Research
Bureau of Intelligence and Research

behalf of the laws of war.

This dismissal of the laws of war has until recently received support, though on very different grounds, from within the international law community itself. As the years since the close of the Second World War have passed, doubts concerning both the legal validity and the justice of the most striking application of the laws of war, Nuremberg and Tokyo trials, have accumulated, and those events have come to be seen as just one aspect of the closing of accounts in that war, and not, as some had hoped, the initiation of a new stage in the development of the laws of war that might provide a universally accepted system of criminal prohibition and punishment for war crimes, by whomever committed. Although the United Nations General Assembly did endorse a set of generalized "Nuremberg Principles" in 1950, this confirmation must be interpreted as basically backward looking, that is, as a confirmation of widely shared feelings about a singular historical event. More important was the refusal of the United Nations to contribute explicitly and comprehensively to the development of the laws of war. The reasons for this refusal, which was quite conscious, are today unpersuasive, but they were apparently advanced most seriously after the war, and were successful for many years in closing the issue. On this view, the laws of war can only have a place in an international legal system in which participation in war is lawful on the part of all belligerents. The Charter of the United Nations, however, divides participation in war into that which is aggressive (hence unlawful) and that which is defensive (hence lawful). Under such a system, an aggressor can have no rights that would advance the pursuit of its criminal aggression, and therefore the laws of war, which confer such rights, must be no longer valid under the regime of the Charter. To this objection, which has at least some basis in the plausible legal principle that engaging in criminal acts should not create rights in favor of the criminal, was often added the more fatuous claim that as war had been outlawed, rules for its regulation would in any case be unnecessary. A sympathetic interpretation of the impulse behind these arguments against the laws of war is that it was one that feared to legitimize warfare by ever

mentioning in the resolutions and conventions developed under the auspices of the United Nations the possibility of its occurrence. It was feared that the image of the organization as one successfully committed to the prevention of war would be sadly undermined if it were to devote major attention to regulating warfare, and that as a result the outbreak of war might be made more likely. A good example of this attitude may be found in the refusal of those involved in the drafting of the International Covenant on Civil and Political Rights, which was concluded as late as 1966, to explicitly mention the possibility of war in the section (Article 4) devoted to the conditions under which certain of its provisions might be suspended, preferring to refer to a "time of public emergency which threatens the life of the nation" instead of war or armed conflict, which was what was foremost in everyone's mind as the condition most likely to require the suspension of fundamental political and civil liberties.

This is not to say that there have not been significant developments in the laws of war since Nuremberg. To do so would be to leave out of account what is arguably the most significant set of rules for the regulation of warfare presently in existence, the Geneva Conventions of 1949, whose purpose is to protect the wounded, prisoners of war, and civilians against further violence after they have been rendered helpless in the course of combat or fallen into the hands of the enemy. Yet it can be argued that these conventions were also backward looking, designed principally to remedy deficiencies in existing rules for the protection of victims of war that became apparent during World War II, and that awareness of them and respect for them, despite widespread accessions, lapsed during the years of international and civil struggle that followed. While the International Committee of the Red Cross, which is especially involved in both the administration of the Geneva Conventions and the development of the branch of international law (sometimes called international humanitarian law) of which they are the chief vehicle, was assiduously involved in these activities during the nineteen-fifties and sixties, it did not receive particular support or encouragement from the United Nations or from indivi-

dual states. The laws of war thus entered, from the point of view of widespread interest in them and in their further development, a period of stagnation. Most of the conflicts involving significant military violence that have occurred during the past quarter century have tended to erode further any sense of the laws of war as an institution significantly capable of limiting the violence of warfare, and hence as deserving of any particular respect or encouragement.

To this dismissal of the laws of war on legal and practical grounds has lately been added a further rejection based on a critique of the political functions of international law generally, and of the laws of war in particular. Broadly Marxist in its assumptions, this conception of international law was already present in the theories of prewar realists like E.H. Carr, who chided England and France for their hypocrisy in appealing to international law as a set of universal principles for the promotion of the common good of international society, when in fact those principles merely preserved an iniquitous status quo favoring the haves over the have-nots (in those days, Germany and Italy). Adapted to present circumstances, this conception of international law survives in the view that the law, especially the customary law that developed through the interactions of European states, reflects the particular needs and interests of those states in their international relations with other peoples. Representatives of non-Western countries at the United Nations and at international conferences have been quick to attack the pretensions of such traditional principles as freedom of the seas and humanitarian intervention, which they interpret as having served to advance the interests of maritime commercial states. In the case of the laws of war, this approach is reflected in the opinion that existing rules of law are unfair between belligerents of different military strength and legal standing. Thus, some provisions of the laws of war, such as those permitting reprisals to secure the compliance of an enemy with the laws of war, are attacked as favoring the militarily powerful, while the rules requiring armed forces to carry weapons openly, wear distinctive uniforms or insignia, and eschew methods involving surprise and terrorism have come to be regarded by many as ruling out the

very means required for success in revolutionary warfare, and thus as favoring established regimes over insurgent forces for whom guerrilla tactics are said to be the only effective form of warfare. While the particular elements of what might be called the "ideological critique" of the laws of war can be expressed in a wide variety of ways, their general tendency is to add yet another kind of ground for suspicion of the laws of war. What is wanted, from this perspective, is a set of rules for war that prohibits unjust uses of military violence, while permitting those which constitute a necessary means for the achievement of such good ends as ending colonial rule and promoting certain kinds of revolutionary change. This attitude is doubly consistent with the United Nations conception of war--first, because despite significant differences from the law of the Charter it reflects the asymmetrical division of wars into lawful and unlawful that is built into that instrument, and second, because with the vast growth of membership in the United Nations it has for a number of years been possible to muster majority support in the General Assembly for resolutions in favor of rules of war that would improve the degree of protection afforded those involved in what the language of the Assembly characterizes as "the struggles of peoples under colonial and foreign rule for liberation and self-determination."[3] One of the more unsavoury outcomes of this movement has been the contrast between continual pressures against Portugal, South Africa, and Israel, and the refusal of the Assembly majority to acknowledge violations of human rights in the politically different circumstances of, say, Bangladesh.[4]

If one overlooks such apparent misapplications of it, the theory that morally defensible laws of war must discriminate among the purposes for which violence is used leads back once again to the view that there is something objectionable in a set of rules that seeks to restrain violence without taking such purposes into account. On this view, our attitude toward the laws of war cannot be divorced from the degree to which the laws of war, as an institution, are capable of distinguishing between morally defensible and morally indefensible uses of military violence, and thus reflect the moral standards which underlie such judgments. To be them-

selves defensible the laws of war must promote, not undermine, these standards. It is this basic conception of the proper function of the laws of war that underlies many of the principled objections to the legal regulation of warfare, and that must be taken into account by anyone who wishes to defend the laws of war, not piecemeal against particular criticisms that might in fact be satisfied by partial reforms of existing rules, but against profound doubts concerning the possibility and legitimacy of the institution itself.

## II

In order to understand and evaluate how vulnerable the laws of war are to this moral challenge, it is necessary to have in mind a clear conception of its target. The laws of war constitute an intricate system of legal rules and practices, far more varied in purpose and legal foundation than most commentators outside the legal profession seem to acknowledge. According to the broadest conception of their scope, the laws of war are only partially concerned with the direct regulation of violence. Much of their purpose, of more interest perhaps to lawyers and to affected governments and individuals than to moralists or social scientists, concerns the determination of the legal consequences of war with respect to such matters as the ownership of property in areas under military occupation, the rights and duties of neutral states and commerce, and the legal validity of existing treaties. Broadly construed, the phrase "laws of war" also applies to rules governing the initiation of acts of force on the borderline of actual warfare (such as peacetime embargoes, reprisals, and interventions), formal declarations of war, and other aspects of the first resort of states to armed force against other states. The challenge with which this paper is concerned, however, is one that is advanced against the laws of war narrowly conceived as a set of principles and rules for the regulation of the violence of warfare once it has begun. So defined, the laws of war can be further divided into those that aim largely to specify the rights and duties of armed forces engaged in combat, and which impose limits on the weapons, targets, and tactics of

warfare, and those designed primarily to ensure the humane treatment of persons affected by the conduct of warfare, especially the disabled, prisoners of war, medical personnel, journalists, and civilians. The latter class of rules also seeks to protect buildings, property, and other material things that it has been thought important to preserve from attack and destruction. In attempting to promote these aims the laws of war have been as much concerned with limiting the violence that may be done to people and things that have fallen into the hands of the enemy following a period of active combat as with limiting the violence of that combat itself. Few clear lines can be drawn between these two divisions of the laws of war, for problems in one area typically raise problems in the other. For example, the taking of civilian hostages and their execution in reprisal for acts by the enemy raises legal issues with respect to the laws regulating the conduct of hostilities, those governing the occupation of enemy territory, and those pertaining to the human rights of civilians affected by war. Further complexity is introduced by the fact that cutting across this division is another set of distinctions based upon the ways in which the laws of war seek to organize and circumscribe warfare in space and time by providing special rules for land, sea, and air warfare, by seeking to distinguish neutral from belligerent territory and safety from combat zones, and by providing for the termination or temporary suspension of hostilities through cease fires, truces, and capitulations. There is, finally, a growing acceptance of the applicability of the laws of war to an increasingly wide range of civil wars, and this has led to the articulation of separate rules for "international" and "non-international" armed conflicts. Each of these aspects of warfare has its own history of regulation through customary and conventional law, and while all tend to reflect the application of the same fundamental principles, some are much more explicitly and successfully regulated than others.

Another fact to be taken into account in judging the laws of war is that they exist as rules of both international and municipal law. Sometimes applied as international law by national as well as international courts and tribunals, the laws of

war also exist in the form of rules constitution a part (usually, a very small part) of the articles of war or military codes of national states.[5] These codes incorporate the laws of war, as interpreted and amended by each state, into municipal law, to be applied by various kinds of military proceedings involving members of a state's own armed forces and, occasionally, members of the armed forces of enemies. As many as ten thousand persons were tried for war crimes by military tribunals during the years immediately following the end of the Second World War,[6] and cases stemming from that war have continued to come to trial in West Germany and other countries. Sometimes the distinction between the international and military versions of the laws of war does not receive particular emphasis, such as when the texts of international conventions and national military manuals are cited as equally authoritative sources of international law (a practice which would appear to be legally incorrect, but which seems to be engaged in as often by lawyers as by non-legal commentators on the laws of war). At other times the distinction between international and military law is carefully defined. For example, Lt. William Calley was tried not under international law but rather for violations of the United States Uniform Code of Military Justice. On the other hand, those who conducted the trials of the major war criminals at Nuremberg and Tokyo believed the significance of their activity to lie in its application of universal and impartial standards of international law. Despite the considerable similarity between the international laws of war and its analogues in the military law of various countries, it is probably wise to keep in mind the different functions performed by each. As international law, the laws of war serve as a common public standard for judging acts of war, and as such provide a model for the corresponding parts of military law as well as a basis for criticizing military practices that particular states deem lawful but that violate the provisions of international law. As military law, the laws of war are mainly a device for the regulation by armed forces of the conduct of their own members, and as such may be regarded as one of the ways that the provisions of the international laws of war are implemented in practice--except where, as is sometime

the case, the military law of particular states is widely at variance with the standards of international law. The complexity that these distinctions record, and the failure to keep them firmly in mind, together account for at least some of the controversy about the proper interpretation of the laws of war. How the laws are interpreted in turn has implications for the moral judgments that are made with respect to them.

In the light of these distinctions, it is clear that many of the most familiar objections to the laws of war do not concern us because they are not relevant to judgments of the laws of war in the narrow sense of an institution for the regulation of armed conflicts once they have begun or, alternatively, because they concern deficiencies in the laws of war that are local and remediable, and thus do not undermine the general justification for the institution as a whole. The criticisms based upon the experience of the Nuremberg and Tokyo trials illustrate both of these points. For one thing, those trials involved law that is quite distinct from the laws of war, and some of the more objectionable features of the trials were connected with these other areas of law. Thus, the charge that German and Japanese leaders were tried for newly invented crimes, those of waging aggressive war and of committing crimes against humanity, does not apply to their prosecution for war crimes. Nor are the otherwise cogent objections to the notion of war as a one-sided conspiracy, or to the futility of invoking thoroughly European conceptions of natural law before a Japanese audience, relevant to judging the laws of war.[7] The moral adequacy of the latter is unaffected by the resolution of these controversies, whatever their outcome. But there are a number of objections to the post-war trials that do apply to the laws of war as they were applied there. The most important of these concern the injustice of prosecuting the vanquished for war crimes also committed by the victors, and the haphazard and summary way in which justice was meted out to the former.[8] A partial answer to these objections, I think, is to point both to the historical uniqueness of the Nuremberg experience, and to the fact that war crimes trials in general are just one way among others for

seeking to implement the laws of war. Despite popular conceptions apparently inspired by the repeated invocations of the Nuremberg events in the context of controversies concerning American involvement in Indochina, neither international tribunals nor criminal prosecution and punishment constitute an essential, or even a very large, part of the institution of the laws of war.

Criticism of the criminal enforcement of the laws of war must, however, be distinguished from a more general criticism of the laws of war as an institution that is supposed to function like a system of municipal criminal law. Such criticism presupposes a conception of the laws of war as a set of rules that is largely concerned to prohibit certain forms of behavior in armed conflicts by making them crimes, and which relies largely upon legal sanctions to achieve this result. The laws of war, on this view, are to be understood as an analogue of ordinary systems of criminal law, that is, as a system of prohibitions backed by threats of punishment for noncompliance. (I will not inquire into how accurate this conception is in its assumptions about the systems of criminal law upon which it bases the analogy.) Many particular objections derive their plausibility from this picture of the laws of war as a system of criminal prohibition and punishment. The situation is further complicated, moreover, by the fact that defenses of the laws of war also often presuppose this conception of them. This is shown by the close link between the notions of a law of war and a war crime regarded as a breach of that law, and by the central place given to war crimes trials in many discussions of the laws of war.

Although I shall argue that this understanding of the laws of war is misconceived, its strengths should not be overlooked. The laws of war do seem to display more of the features of criminal law than of, say, torts or contracts. Like crimes, acts in violation of the laws of war are crimes against (international) society, and not only against the injured party. Insofar as the law provides the offended party with the means to combat the offense, it is in the form of an authorization to punish captured enemies as war criminals if their acts constitute war crimes under the international laws of war, or to conduct reprisals against the offending

state. The purpose, in either case, is to enforce the laws of war, and not to exact compensation; the laws of war with few exceptions provide for punishments, not reparations. The contractual aspect of the laws of war is also minimal, because the obligations they impose rest upon a firm substructure of custom, of which many of the provisions of international treaties are taken as declaratory, and which are binding even in circumstances in which particular treaties are not; and because the conventional basis of the laws of war now consists of multilateral treaties to which individuals remain bound even if their enemies violate the law. Furthermore, the conception of the laws of war as criminal law is even more plausible applied to the municipal versions of its rules contained in national military codes, which typically provide for the criminal prosecution and punishment of offenses by individual members of the armed forces whose behavior is regulated by them. And lastly, because of the often atrocious nature of the acts prohibited by the laws of war, the propensity to regard them as crimes--that is, as acts generally injurious to mankind that international law should seek to prevent and to punish--is very great.

What is wrong with this view of the laws of war is that it obscures the distinction betweem various aspects of the institution that should, in considering its defects and merits, be kept separated. It attributes to the international laws of war certain features that are more properly characteristic of military law, and takes as defining the essential purpose of the former the criminal law features of the latter. It does this in part by presuming that the international laws of war should restrain the acts of states just as criminal law restrains the acts of individuals. This, however, is the wrong way to conceive the functions of the laws of war; it emphasizes a task that the system, in its international version, is ill-equipped to perform. A better view is one that makes a firm distinction between the international laws of war and municipal systems of military justice, and which recognized that, even though the rules and principles of the international and the various military systems may overlap, they promote different purposes in the regulation of warfare. Military law does seek to regulate the conduct of individuals in

much the same way as civilian criminal law, and can reasonably rely upon criminal prohibition and punishment as a means toward this end, at least as much so as other criminal law. But the international laws of war, despite the Nuremberg experience which many would like to take as a precedent, do not themselves provide for the international prosecution of war criminals, but rather leave this to individual states. What the international laws of war are best regarded as seeking to do is to establish authoritative common standards for the conduct of states, as well as individuals, in warfare. These are standards that national leaders are to take as guiding their decisions with respect to the use of military force in armed conflicts, and which are to be reflected and supported by national systems of military law. Thus, instead of providing for the punishment of war criminals by international tribunals, the laws of war identify certain acts as war crimes and urge state officials both to avoid their commission and take responsibility for prosecuting and punishing them when they have occurred. To this end, most of the rules on enforcement in the Geneva Conventions and in the Draft Additional Protocols to them that are presently being negotiated concern the obligation to cooperate in providing mutual assistance in the extradition and prosecution of persons charged with violating the laws of war. On this view, the criminal law aspect of the laws of war--that is, the definition of certain acts as war crimes, and the prosecution and punishment of offenders through trial--is only one among a number of possible means for promoting the standards represented by the laws of war. To judge the laws of war deficient as a means of limiting the violence of war in proportion as the system of criminal enforcement seems ineffective is thus to mistake the means for the end.

There is another reason why we should hesitate to speak of the laws of war as if they constituted a criminal code, and this is that they perform a much wider range of functions. The laws of war do concern themselves with matters that are central to any system of criminal law; they define as offenses against the law forms of conduct to be avoided, identify the various categories and degrees of offense, provide for their punishment, and lay down various justifying and excusing conditions

according to which charges of criminal wrongdoing and responsibility may be defeated or mitigated. But the laws of war also perform functions that cannot be fitted into this model of criminal law. For example, they create and define various legal positions (such as belligerent, neutral, combatant, prisoner of war, etc.), and confer various rights, as well as obligations, on each. They establish certain recognized ways for identifying medical facilities and personnel, and neutralized and protected zones and structures, by specifying the insignia and signals to be used by units engaged in medical care, civil defense, and humanitarian relief. They not only limit, but also facilitate, the war-related activities of states by conferring on them (and on other recognized belligerents) legal rights with respect to a wide range of matters in combat, in their relations with other states, in the administration of occupied areas, and in the maintenance and employment of prisoners of war; and by empowering them to take measures, including reprisals, domestic legislation, and criminal prosecution, to secure those rights. The laws of war also empower certain states and international organizations, most notably the International Committee of the Red Cross, to oversee the application of the Geneva Conventions, provide humanitarian relief for the victims of armed conflicts, visit prisoner of war camps, and promote the further development of the laws of war. Finally, they increasingly seek to confer rights on individuals affected by warfare and to make it possible, through linking such protection with the international law of human rights, to provide individuals with some recourse, however rudimentary and inadequate, against the violence of military operations.[9] To focus exclusively on the criminal law aspects of the laws of war is to neglect these other features of the system, and thus to prevent a distorted picture that encourages inaccurate and inappropriate expectations with respect to its purposes and functions. The view which displays these defects I shall, in what follows, refer to as the "criminal law interpretation" of the laws of war.

## III

As a source of standards for judgment and action in armed conflicts, the international laws of war may still be deficient. They may be largely ignored, and hence fail utterly in the promotion of behavior that according to those standards ought to be encouraged. Alternatively, they might actively promote the wrong behavior, because the standards they represent are morally deficient. The latter view is articulately argued by Richard A. Wasserstrom in his essay "The Laws of War."[10] Both the exact target and the basis of Wasserstrom's attack are, however, elusive. He takes as the object of his criticism a "conception" of the laws of war, being careful to avoid the factual claim that the laws of war actually display the features of this conception, but nevertheless suggesting that they probably do or come close to doing so. This conception is one that reflects the criminal law interpretation because in it the laws of war appear as a set of prohibitions backed by penal sanctions (although this last feature receives no particular emphasis). It is also a conception that gives much weight to military considerations where they clash with those that are procedural or humanitarian; this, in fact, is the principal reason Wasserstrom finds it objectionable. His criticism is thus taken up, in a way that will be explained in a moment, with what might be called the "military interpretation" of the laws of war. What is puzzling in Wasserstrom's argument is that it seems both to criticize and to presuppose the military and the criminal law interpretations of the laws of war. There is no necessary connection between the two interpretations; they simply happen to be related, as a matter of contingent fact, in Wasserstrom's discussion. Perhaps this can be explained by the fact that he leans very heavily on an account of the laws of war by Telford Taylor, a former general and Nuremberg prosecutor, which itself presupposes both the military and criminal law interpretations.[11] Although Wasserstrom is critical of this account, his discussion reflects the same conception of the laws of war. The two differ only in that Taylor accepts and Wasserstrom rejects the practical and moral adequacy of this conception.

In order to forestall misunderstanding, I would like to make it clear that by the "military interpretation" I mean a conception of the laws of war that gives much more weight to considerations of military expediency than one like that which the International Committee of the Red Cross seeks to promote, which might for the purposes of contrast be labeled "humanitarian." Both are marked, however, by considerable deference to the presumed realities of armed conflict; what differentiates them is that the military interpretation is most concerned to forbid only acts of violence that do not confer a military advantage, and that in fact may additionally represent a threat to military discipline--such as rape, murder, and pillage by an invading or occupying army, or the cruel mistreatment of prisoners of war. While both interpretations grant considerable weight to military considerations--even the humanitarian view, after all, begins with an acceptance of warfare as a regretably unpreventable activity to be regulated by rules that are basically compatible with the military interests of belligerents--they differ in the degree to which they admit such considerations as overriding humanitarian concerns. One of the chief expressions of this difference is to be found in the way in which particular rules of war, which are much the same on both interpretations, are qualified by the principle of military necessity; another lies in the degree of willingness to see violations as undermining the legal validity of particular rules. To say that Wasserstrom's account displays a military interpretation is thus to say that it employs certain criteria for specifying what is permitted by the laws of war, according to which more violence is allowed, than would be lawful under rules specified according to less permissive criteria; it is not to attribute to him the view, which is in fact just opposite that which he defends, that such criteria are morally defensible.

Wasserstrom's basic concerns are these: If the laws of war are judged according to moral criteria, how do they fare? Should there be laws of war, and if so, what--morally speaking--should they be? He suggests that there are two ways in which the laws of war might be morally justified. One seeks to justify the laws of

war in terms of the putatively desirable consequences that follow from their acceptance. The other argues that the laws ought to be accepted because they "reflect, embody and give effect to fundamental moral distinctions and considerations" (p. 1). Wasserstrom finds versions and applications of each of these views in Taylor's book, and is concerned to refute both. Taylor in his book had argued on behalf of the laws of war that, though often violated, they were often enough observed so that many lives were saved in consequence (p. 40). He had also urged their value in limiting the brutalizing effects of war on its participants by teaching the distinction between necessary and unnecessary, arguing that it is of the greatest importance after a war's conclusion as well as during it that soldiers not be allowed to think that unnecessary killing is permissible (p. 41). Wasserstrom is unpersuaded by the first argument, and repelled by the second; and it is his reaction to the second that is crucial. Far from teaching a necessary moral lesson, the laws of war reflect moral standards that are morally incoherent, as well as morally substandard. That is, the rules are morally inconsistent in forbidding soldiers, for example, to kill with poison while permitting other equally horrible means such as anti-personnel bombs or nuclear weapons (p. 11); such inconsistency is to be distinguished as an additional flaw from the consistent immorality of, say, permitting attacks on noncombatants. Both, however, are equally grounds for finding the laws of war to be intrinsically deficient from a moral point of view. But there is also a consequentialist objection, for not only do the laws of war permit immoral behavior, they encourage it. The laws of war function legally in such a way as to conform themselves to developments in military technology and strategy, so that far from restraining the violence of war, they simply institutionalize and promote it. Therefore, the laws of war perform no moral function; the only morally acceptable code of war would be one that forced practice to conform to moral standards, and not, as do the laws of war, adjusted moral standards to current practice, no matter how inhumane.

Wasserstrom then, agrees with Taylor that the laws of war teach a moral lesson

but he thinks it is a bad lesson. And this result, together with its further consequences--that is, both the promotion of morally objectionable standards and the encouragement of violence that follows from it--are in turn sufficient to leave Wasserstrom unpersuaded by Taylor's first argument, that the laws of war are worth having because they are sometimes observed and thus save lives. For even if this is so, it is a gain that according to Wasserstrom is likely to be cancelled out by the lives that are lost as a result of violence encouraged by the laws of war. This is scarcely a proof, because it depends upon a series of factual claims and counterfactual hypotheses that neither are nor, in some cases, are capable of being adequately defended; it seems to be advanced here rather as a speculation and as a warning that to engage in war according to the laws of war would, under present circumstances, "increase still further our tolerance for and acceptance of the horror, the slaughter, and the brutality that is the essence of Twentieth Century war" (p. 19). Where Taylor worried about the corrosive effects of neglecting the laws of war, Wasserstrom is concerned with the corrosive effects of their observance. Instead of "embracing" the laws of war, and "concentrating our energies and our respect upon its enforcement," therefore, we should try to articulate and promote a more morally coherent and ambitious conception of the laws of war, one that requires changes in the practice of war rather than accommodates law to existing practice.

Some of the things that Wasserstrom says about the laws of war are true, and many of his criticisms of Taylor's judgments are well founded. One can understand and even share his repugnance for Taylor's conception of the laws of war, and if it is correct, for the laws of war themselves. Nevertheless, Wasserstrom's arguments are bad ones and their conclusions unwarranted. His account is thus fundamentally misleading. For one thing, it depends upon an interpretation of the laws of war that is faulty because it mistakes the role of military necessity and of mutual violations in determining the legal validity of particular rules. Second, it presupposes a misconceived notion of the functions of law in the regulation of

warfare, and of the proper relation between legal rules and moral judgment in this area. And, third, it supports a withdrawal from the idea of publically accepted standards of conduct of war to a realm of private moral judgment, an idea that is itself morally questionable.

On the matter of legal interpretation, Wasserstrom is himself seriously misled in his reliance upon Taylor's understanding of the laws of war. His claim that the legal capacity of the laws of war to restrain violence is vitiated by the principle of military necessity is based upon an unusually extended version of that principle adopted from Taylor, whose views on this question Wasserstrom seems to take as authoritative. In fact, they are legally eccentric, although perhaps expressive of large segments of both military and public opinion. This conception of military necessity treats it as a general overriding condition that legalizes acts of war otherwise prohibited if they can be shown to confer certain kinds of military advantage. Such acts, for example killing prisoners of war in circumstances in which maintaining them would threaten the survival of a military unit or the success of its mission (Taylor, p. 36; Wasserstrom, p. 4), or direct bombardment of civilian populations where the disruption and demoralization that results can hasten the defeat of an adversary by undermining military production and political support for continued resistance (Taylor, pp. 142-43; Wasserstrom, pp. 6-7), are on this interpretation of military necessity not violations of the laws of war, and hence excluded from the category of war crimes. It is to be contrasted with another conception of military necessity, which is that the appeal to necessity is only allowable where it is explicitly provided for by the conventional laws of war; where it is not, the conventional prohibitions must be regarded as absolute. This view still leaves much latitude in the application of the laws of war, because as customary law the latter have always been construed to allow for considerable deference to the requirements of military operations, and its codification in written instruments like the Hague and Geneva Conventions were framed with similar considerations in mind. On this view, then, the principle of military necessity

retains its place as one of the basic principles upon which the laws of war are based, but it cannot be considered one that has priority over all other rules and principles that constitute the laws of war, according to which the latter can always be overriden. On narrow view, there are some necessary measures of--however "necessary" might be interpreted--that are not permitted by the laws of war.

Although the proper interpretation of military necessity in international law has for many years been a contested issue, the weight of argument supports the narrow interpretation. For one thing, the balance of legal opinion, especially after 1900 and increasingly down to the present, clearly favors it. But more important, for this fact alone could not be decisive, is the consideration that the broad interpretation must be incorrect because it is incompatible with the international conventions that constitute the primary source of the laws of war. It is true that, even on the broadest interpretation of military necessity, there would still be room for rules prohibiting gratuitous cruelty and violence unrelated to any military purpose. But it has in addition clearly been the intention of states, as expressed in these conventions (as well as in the military manuals based upon them), not only to impose restraints on such unnecessary and even inexpedient outrages, but also to impose certain definite, if limited, restraints on the conduct of military operations even where particular acts or policies might confer a momentary advantage upon one side or another, and including those that might be construed as necessary for the success of military operations and for the survival of the military units engaged in carrying them out. These restraints include many that have traditionally had a place in the customs of war, and have been repeatedly reaffirmed without qualification by successive treaties down to and including the present Draft Protocols. Among the prohibited acts of war that might at times prove to be militarily advantageous or necessary are acts of "perfidy" such as feigning cease-fires and surrenders in order to take advantage of an adversary's compliance; acts of violence against disabled or captive enemy combatants, and especially the refusal of quarter; and the imposition of collective penalties by

an occupying force. To these traditional prohibitions have been added rules expressly forbidding misuse of the Red Cross emblem and similar protective insignia, torture or mutilation of prisoners of war, taking of hostages, any innumerable less serious abuses. Under Article 3 of the Geneva Conventions, these rules are supposed to apply to civil as well as international conflicts.

The Hague and Geneva Conventions nowhere provide that the rules prohibiting such acts may be suspended on the grounds of military necessity. The evidence that this supports the narrow interpretation is both negative and positive. The negative evidence is that the conventions do on occasion specifically provide that particular prohibitions may be overridden in exceptional circumstances that can be held to constitute a condition of military necessity; for example, Article 23g of the regulations appended to the Fourth Hague Convention of 1907 prohibits the destruction or seizure of enemy property "unless such destruction of seizure be imperatively demanded by the necessities of war." The clear implication of such explicit references to military necessity is that it cannot be invoked to qualify the prohibitions laid down by other articles in which necessity is not mentioned, and which must therefore be regarded as absolute as far as exceptions suggested by military requirements are concerned. The positive evidence is to be found in assertions to the effect that prohibited acts of the sort mentioned above "are and shall remain prohibited at any time and in any place whatsoever" (Geneva Conventions, Article 3), and that those party to the conventions must respect their provisions "in all circumstances" (Article 1). Similar language occurs throughout each of the four Geneva Conventions of 1949. At least with respect to some acts of war, then, military necessity provides no grounds for overriding the rules that forbid their commission, and the laws of war cannot therefore be interpreted as conferring on military commanders the discretion to decide whether such rules are or are not in such cases legally binding. It is, furthermore, this narrow interpretation of military necessity that is most often reflected in military codes, judicial opinion, and legal commentary. It is an interpretation that corresponds

to an obvious need for some restriction on the principle of military necessity if the laws of war are to have any point as rules designed to regulate the use of violence for political purposes, and not simply to repress aberrant criminality unrelated to policy.

The arguments that Taylor advances on behalf of the broad interpretation of military necessity will not bear scrutiny. He argues that the determination of which acts of war are militarily necessary is "a matter of infinite circumstantial variation" (p. 35). This may be so, but the point is irrelevant where acts that a prohibited without qualification by the laws of war are involved. He also argues, in connection with the killing of prisoners of war (that is, denial of quarter) in circumstances under which to do otherwise would endanger the success of the mission or the safety of the unit, that "no military or other court has been called upon . . . to declare such killings a war crime" (p. 36). This also may be so, but as an argument for the broad interpretation of military necessity it is weak.[12] Even weaker is the argument that Taylor bases on a selective reading of successive United States Army field manuals. He cites a passage from the 1956 version, which states: "The prohibitory effect of the law of war is not minimized by 'military necessity' which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." Taylor thinks this is ambiguous, and moves on to his claim that necessity is a matter of infinite circumstantial variation and his prisoner of war example. But it is worth pausing to notice two facts about the statement. First, it implies that military necessity may only be invoked in connection with acts "indispensable for securing the complete submission of the enemy," which seems to imply military victory and does not necessarily include the successful completion of particular missions or the protection of the safety of particular units. Second, and far less ambiguously, military necessity cannot be invoked to justify measures forbidden by international law. On the broad interpretation of military necessity, this statement would be rendered

circular and meaningless. It is, in fact, a clear expression of the narrow interpretation, similar to those that have appeared in successive American manuals from their beginnings in the Lieber rules of 1863. Taylor oddly ignores both the Lieber and the 1956 definitions of military necessity, which reflect the narrow view, and relies instead upon a sentence from the manual of 1917 which says: "A belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of war; that is, the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money." Apart from the fact that this statement again ties the appeal to necessity with military victory, its substance is qualified in the next paragraph (which Taylor fails to cite) as justifying only measures "not forbidden by the modern laws and customs of war."[13] All the editions in fact contain this same limitation on the appeal to military necessity. If these manuals support anything at all, it is not the broad interpretation of military necessity.

The fact that Taylor's arguments in favor of the broad interpretation are bad ones, together with the availability of sound arguments that favor the narrow interpretation, is sufficient to suggest that the laws of war do not cease to be binding whenever considerations of military necessity, much less of mere military advantage, seem to require the commission of prohibited acts. In his reliance on Taylor's interpretation of military necessity, Wasserstrom is thus led to attribute to the laws of war a moral defect that they do not in fact possess. Wasserstrom is also misled by Taylor on another question of importance, the effect of mutual violence of particular rules of warfare on the legal validity of those rules. Taylor's position is that where both sides have violated a rule, it ceases to be a binding rule of law. His main argument in favor of this conclusion is that the Germans were not prosecuted at Nuremberg for violations of the laws of war, such as the sinking of merchant ships by submarines without warning and without provision for the safety of the former's passengers, that were also practiced by the Allies. But this failure to convict can be explained on other grounds than that the

Nuremberg Tribunal believed that the relevant rules were no longer legally valid; in fact, the Tribunal appears to have upheld the law in the case of submarine attacks while declining to press the charge in view of comparable violations by the Allies.[14] The principle that applies here, tu quoque, is that a state that has violated a particular rule may not prosecute an enemy for similar violations.[15] Although there exists controversy about whether tu quoque expresses a valid procedural principle, it must not be confused with the quite different principle that mutual violations invalidate the rules of warfare.

The problem with respect to ascertaining which rules are valid rules of law within the system with which we are concerned is one of uncertainty. The problem arises because of the thinness and unreliability of other rules, explicitly framed and widely accepted, and applied within a framework of established procedures, according to which judgments concerning the validity of substantive rules of war can be authoritatively made. To varying degrees this is a defect of all international law. The problem of uncertainty is most acute with respect to customary law for there are not clear criteria for deciding either the point at which a practice (which may itself represent a departure from existing customary or conventional rules) has become customary and thus gives rise to a new rule, or the point at which an existing rule ceases to be binding, and thus for states to cease to have any obligations under it, because it no longer resembles customary practice. It is one of the functions of conventional law to alleviate such uncertainty, but where the result is a disorderly combination of customary and conventional rules, as is the case with the laws of war, the resulting complexity may sometimes make up for whatever uncertainty is removed by the addition of conventional law to a body of existing custom. What is clear, however, is that the law of war conventions contain no provisions to the effect that particular rules cease to be valid rules of law if violated either by one party or by many; on the contrary, the conventions explicitly define acts that constitute violations, provide for their repression, and seek to limit the freedom of signatories to withdraw from the

obligations imposed by the conventions. Thus the Fourth Hague Convention of 1907 identifies certain acts as especially forbidden, requires parties to the Convention to issue military regulations in conformity with its provisions, and imposes a period of delay before withdrawal from the Convention can take effect. The 1949 Geneva Conventions each define "grave breaches," prohibit any party from absolving itself or another party from liability for their commission, require the parties to cooperate in their enforcement through national legislation and judicial proceedings, prohibit denunciation of them by parties engaged in armed conflicts, and provide that denunciation and withdrawal by some parties does not affect the obligations of others. There is little here to support, and much to counteract, any easy connection between inefficacy and invalidity.

Given the uncertainty of the rules, it is hard to show conclusively the error of those who are quick to jump from violations of the laws of war to the conclusion that the latter no longer constitute valid law. But it is even harder to support the claim, not merely that the law is uncertain, but that particular rules have clearly and certainly lost their validity as laws of war. If the rule is a customary one, it must be established that the practice prohibited by it has become so common as to constitute a new custom according to which legal rights and obligations must now be judged. If violations of conventional rules are involved, one must be able to show that such violations invalidate the convention, by pointing either to express provisions to that effect or to accepted principles of treaty interpretation such as those of the Vienna Convention on the law of treaties. What these principles appear to permit, at most, is withdrawal from a treaty by one party if other parties violate it; the mere fact of violation cannot itself cancel the treaty. In the absence of any such legal basis for the claim, it is wrong of Taylor to conclude that rules that have been violated in a particular conflict can no longer be regarded as constituting a part of the laws of war.[16] As in the case of military necessity, what is being reflected here is the military interpretation of the laws of war, according to which controversies of legal interpretation are

regularly resolved in favor of military license and against military restraint.

There is one respect in which Wasserstrom takes the military interpretation even further than Taylor. He claims that even a less permissive conception than that reflected in Taylor's account would still be morally deficient because it ignores the distinction between combatants and noncombatants. This is thought to follow from the fact that certain forms of warfare, such as strategic bombing and the use of nuclear weapons, are not well-regulated. It is true that there do not exist detailed and explicit conventions dealing with these and other novel forms of warfare, and therefore that the law governing them must be extrapolated--with all the uncertainties that entails--from existing rules and principles that either refer specifically to other forms of warfare or else are very general. But it does not follow from the fact that a particular mode of warfare is poorly regulated that the laws of war ignore the distinction between combatants and noncombatants. On the contrary, that distinction is quite fundamental to existing customary and conventional law. It is only on an extreme military interpretation, according to which the civilian population might itself constitute a legitimate military objective that may be directly attacked if to do so is thought to contribute to military victory, that this distinction breaks down. Here, as elsewhere, Wasserstrom is too willing to accept, as evidence of law, practices--such as the bombing of German and Japanese cities in World War II--that can just as plausibly be presented as war crimes. It is interesting how many people are unaware that in bombing Germany, the British often chose to attack civilian rather than military objectives--that despite what the British public and the flyers in Bomber Command were regularly told, a major purpose of the bombing offensive for much of the war was to destroy the main commercial and residential areas of Germany's principal cities, and that in implementing this policy many targets of military significance were purposely neglected. This ceases to be perplexing as soon as it is understood that the rationale of these raids was that Germany might be brought to the point of capitulation by killing, "dehousing," and demoralizing its urban population.

Few have appealed to the laws of war to justify this policy, which does ignore the distinction between combatants and noncombatants by making civilians the direct object of attack; what is legally defended is rather the myth that any harm to civilians in the strategic bombing was an incidental and unavoidable concomitant of attacks on military objectives, narrowly defined.[17]

IV

According to Wasserstrom, the significance of objections of the sort that he advances is that they must lead us to conclude that the laws of war are morally deficient, with respect both to the intrinsic morality that the rules embody and express and to the consequences that follow from their acceptance. But even had the argument for this conclusion been less defective, one would have to question its assumptions about the functions of the laws of war. The suggestion that a debilitating deficiency of the laws of war is that they embody and give effect to an incoherent and substandard morality reflects the assumption that the function of the laws of war is that of a moral code. On this view, not only must the particular rules of a system of laws individually correspond to those of morality, but the system as a whole must in addition display features like "coherence" and "completeness" that characterize any adequate moral code. This is a very odd conception about the relationship between law and morality. It is one thing to make a legal system, or some part of it, the object of moral judgment, but quite another to expect it to reflect fully the concerns of morality with respect to a particular area of social and political existence. No doubt the temptation is very great to regard the laws of war as a moral institution that ought to mirror our moral judgments about war or else suffer our rejection. It is an attitude prompted by the reasonable consideration that where so much destruction and suffering is the result of a regulated practice, there must be morally compelling reasons for consenting to rules that permit the usual objections to violence to be overridden. For these reasons, the impulse to subject the law to moral scrutiny cannot be

faulted. The mistake arises when, instead of inquiring into the moral merits of a legal system, we begin to think of the law as something that could be directly appealed to in making moral judgments (as Taylor tends to do when he suggests that the prohibition of unnecessary killing teaches soldiers an important moral distinction without which they would return to society as potential murderers), or else (as Wasserstrom urges) one that is morally pernicious because it teaches the wrong distinctions.

What is wrong with this propensity to use the laws of war as if they could provide a morally adequate basis for judgments about acts in war, as well as to criticize the laws of war for failing to provide defensible moral standards for making such judgments, is simply that the laws of war are not a moral code but a legal one. There are differences in function and purpose between moral and legal rules that both Taylor and Wasserstrom, in their different ways, neglect. As a result of these differences, legal rules possess many features that would be inconvenient and unacceptable as morality. For example, law often involves distinctions and principles that are morally trivial, but which are required in the regulation of complex human activities. The law may even prescribe morally dubious action in situations in which the need for having some rule is more important than the precise content, within limits, of the rule adopted, or where a particular moral concern, in being translated into law, must be altered to accomodate the requirements of its practical application within an existing legal system. Thus in addition to the independent moral acceptability of particular rules, one must consider their compatibility with existing law and legal procedures, and the practicability of their application in the circumstances which they are intended to regulate. Given the many ways in which legal rules differ in form and content from moral rules, require different action, and serve different aims, it is pointless to fault the former for these differences apart from a very general inquiry into the purposes and functions of a particular branch of law. To put it differently, the general justifying aim of the institution as a whole cannot be neglected in the attempt to

arrive at sound judgments concerning its moral adequacy or the adequacy of its constituent parts.

In the case of the laws of war, this general justification is to be found in the ways in which they serve to sustain standards according to which judgments of violence can be made that are relatively clear and consensual. In presenting the laws of war in this light, I have emphasized their public character, in contrast to other principles which despite their claims to greater moral adequacy must in view of their limited recognition be regarded as private. As international law, the laws of war represent a compromise between divergent interests and principles, and can be cited as standards to which almost all nations have given their qualified consent. In spite of both their moral deficiencies and the persistence of disagreements concerning their proper interpretation, the laws of war possess the incontestible advantage of nearly general recognition as an existing, valid system of rules for the regulation of armed conflict. To understand the laws of war in this way is not, of course, to free them from moral criticism. Certainly the system badly needs reform. It is also possible to imagine laws of warfare that depart so far from the standards of morality as to lead us to conclude that the advantages of having them were of little worth compared with the evil of consenting to really deparaved standards. If this is the moral critic's fear, I have tried to show that it is an exaggerated one made plausible only by a far too permissive interpretation of what the laws of war permit, and an unreasonably narrow conception of the functions they perform combined with an unreasonably elevated expectation concerning the functions they should perform. A more serious problem is that the manner in which the laws of war as public standards are privately interpreted and applied goes a long way toward wiping out whatever gains might be thought to follow from the fact of publicity. Yet however deficient in effective authority and certainty they may be, the laws of war are superior with respect to these qualities than any more morally acceptable set of nonlegal principles could be. This is why many advocates of reforming the laws of war are reluctant to support the negotiation

of a new comprehansive code to be adopted in place of the existing patchwork of heterogenous, obsolescent, and undeniably inadequate customary and conventional rules, and prefer instead to merely add further to the existing body of accepted law. They recognize the dangers of losing, in the attempt to improve them, the common standards we already have.

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## FOOTNOTES

[1]This paper was prepared for the panel on "International Law and the Regulation of Armed Conflicts," sponsored by the International Law Section of the International Studies Association at its annual meeting, February 19-21, 1975.

[2]H. Lauterpacht, "The Problem of the Revision of the Law of War," British Year Book of International Law, 29 (1952), p. 382.

[3]United Nations General Assembly, Document A/8761, p. 98.

[4]The deficiencies of the response within the United Nations to the Bangladesh situation are discussed by John Salzberg, "The United Nations and the Bangladesh Crisis: A Case Study of U.N. Capability to Deal with Massive Violations of Human Rights," in The United Nations: A Reassessment, ed. John M. Paxman and George T. Boggs (Charlottesville: University Press of Virginia, 1973), pp. 114-128.

[5]The relationship between international and military law has not received the attention its theoretical interest and practical importance deserve. Joseph Bishop, Justice Under Fire (New York: Charterhouse, 1974) is a brief popular discussion of the subject.

[6]Telford Taylor, Nuremberg and Vietnam: An American Tragedy (Chicago: Quadrangle Books, 1970), p. 28.

[7]Judith N. Shklar, Legalism (Cambridge: Harvard University Press, 1964). Another polemic against the presuppositions of these trials is Richard H. Minear, Victor's Justice: The Tokyo War Crimes Trial (Princeton: Princeton University Press, 1971).

[8]The substance of these charges is imaginatively recreated in a novel by Gwyn Griffin, An Operational Necessity (New York: G.P. Putnam's Sons, 1967).

[9]The view that the laws of war can be regarded as protecting human rights in armed conflicts is one that has received particular emphasis in resolutions of the General Assembly, and is defended by G.I.A.D. Draper, "The Relationship Between the Human Rights Regime and the Law of Armed Conflicts," Israel Yearbook on Human Rights, 1 (1971), pp. 191-207.

[10]The Monist, 56 (1972), pp. 1-19.

[11]Taylor, 1970. Wasserstrom's views were initially presented in the form of a review of this book that appeared in The New York Review of Books, June 3, 1971, pp. 8-13. References to Taylor's book and to the Monist version of Wasserstrom's essay are hereafter cited in the text by parenthetical page numbers.

[12]Taylor's use of this and other examples is examined by Marshall Cohen, "Morality and the Laws of War," in Philosophy, Morality, and International Affairs, ed. Virginia Held, Sidney Morgenbesser, and Thomas Nagel (New York: Oxford University Press, 1974), pp. 71-88. I am indebted to Cohen's essay for clarifying a number of issues raised by the Taylor-Wasserstrom debate.

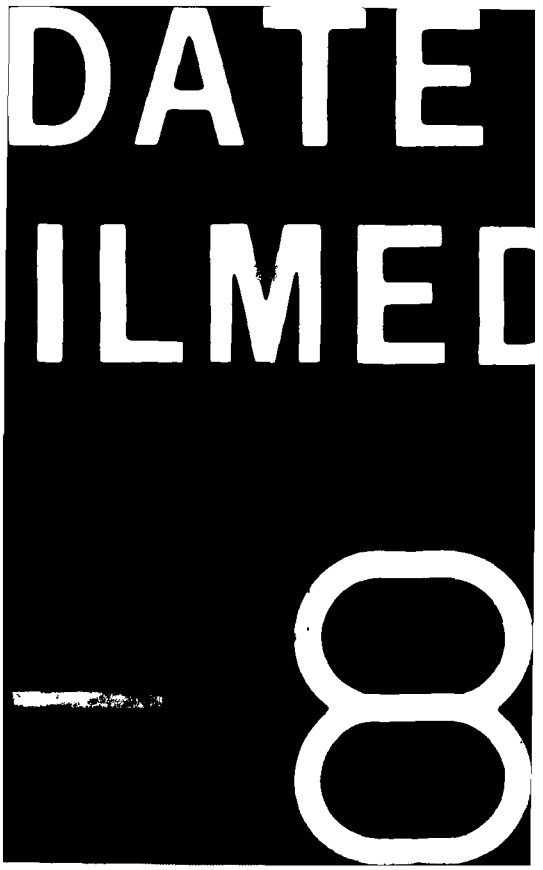
[13]The Rules of Land Warfare (Washington, D.C.: Government Printing Office, 1917), p. 14.

[14]Cohen, p. 79. Cohen also suggests that on Taylor's view of the relationship between violations and legal validity, one might conclude that the principle of military necessity has itself ceased to form a valid part of the laws of war. Taylor does not, however, pursue his argument to this conclusion.

[15]Frits Kalshoven, Belligerent Reprisals (Leyden: Sijthoff, 1971), p. .

[16]Wasserstrom is more cautious, arguing only that the moral defensibility of the laws of war is undermined in this respect "if part of the idea of a war crime is, as some of the literature surely suggests it is, that an offense ceases to be an offense once the practice becomes uniform" (p. 13, emphasis added).

[17]Taylor helps to perpetuate this myth when he writes that in bombing German cities the British were "attacking a functioning part of the German war machine with a weapon that could not discriminate among those in the target area" (p. 143). So does Bishop (Justice Under Fire, p. 267), who argues that "the massive bombings of Hamburg and Frankfort, though they necessarily inflicted enormous suffering on civilians, were not in my opinion, war crimes, for the RAF had no other way to knock out such legitimate targets as arms factories, submarine pens, and transportation networks."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